

COVID-19, Constitutionalism and Emergencies under Ghana's 1992 Fourth Republican Constitution

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Introduction

Ghana has adopted several measures in tackling the COVID-19 global pandemic, chief among them being the enactment of new legislation to tackle the issue, and the exercise of powers under pre-existing legislation. A formal state of emergency has not been declared in the wake of the pandemic, leading to debates, for instance regarding the impact of the current situation on the 2020 elections. That notwithstanding, the Government of Ghana has argued that the measures it has adopted so far have been effective in terms of reducing or slowing down the spread of the virus through its three-pronged approach of Tracing, Testing and Treatment. As a result, the restrictions on movement in the hotspots of the COVID-19 spread have been lifted as at 19th April 2020.

Constitutional and Legal Framework for dealing with Public Emergencies in Ghana

Chapter 5 of the 1992 [Constitution of Ghana](#), specifically Articles 12 to 33, is dedicated to the protection and defence of Fundamental Human Rights and Freedoms. Interestingly, Articles 31 and 32 deal with emergency powers. One could reasonably infer that the framers of the Constitution intended to limit the enjoyment of rights and/or impose restrictions thereof that may detract from the full enjoyment and realization of these rights in emergencies. Accordingly, the Constitution provides for circumstances under which a state of emergency may be declared. Among them are: a natural disaster, or situations where certain acts are undertaken or threatened to be undertaken by an individual or groups of persons, which may lead to deprivation of the essentials of life, or make it necessary for measures to be taken to secure public safety, the defence of the country and the maintenance of public order, supplies, and services essential to life.

However, as indicated by the use of the word “include” in Article 31(9), this is not an exhaustive list. Thus, potential emergencies that are akin to natural disasters, like the outbreak of COVID-19, which has been declared a global pandemic, can be considered emergencies for the purposes of the 1992 Constitution. The Constitution then carefully balances the powers of the branches of government in the wake of such emergencies: The power to declare a state of emergency is primarily vested in the Executive, i.e. the President, whilst Parliament has oversight

in terms of approving or revoking such declarations of emergencies. The Judiciary is empowered to superintend over cases involving persons who are detained or restricted during emergencies. The Emergency Powers Act, 1994 (Act 472) was enacted to give effect to Articles 31 and 32, and to provide the broad framework for the taking of measures that are reasonably justifiable in dealing with emergencies.

In terms of the power of the President to declare a state of emergency, Article 31(1) of the Constitution provides that:

“The President may, acting in accordance with the advice of the Council of State, by Proclamation published in the Gazette, declare that a state of emergency exists in Ghana or in any part of Ghana for the purposes of the provisions of this Constitution.”

Subsequently, the President is required to immediately place before Parliament the facts and circumstances leading to the declaration of the state of emergency which has to decide within 72 hours whether the President’s proclamation should remain in force or should be revoked. This decision of Parliament is final, and the President is bound by it. Any declaration of a state of emergency ceases to have effect upon the expiration of seven days beginning with the date of publication in the Gazette, unless before the expiration of that period Parliament approves it by a majority backed resolution.

The state of emergency, once approved by a parliamentary majority remains valid for three months, beginning on the date of said approval, unless Parliament specifies an earlier termination date. Parliament may also by a majority backed resolution extend its approval of the state of emergency for periods not exceeding one month at a time. A state of emergency only applies to that part of Ghana where an emergency exists and not necessarily the entire country; and at any time during the pendency of a state of emergency, Parliament may by a majority backed resolution revoke the declaration of the state of emergency. The possibility of abuse and violations of rights during emergency situations is recognized and addressed by the Constitution in Article 32, captioned “Persons Detained under Emergency Law”. Here, anyone restricted or detained by a law implemented pursuant to a declaration of a state of emergency shall have his case reviewed by a tribunal composed of not less than three Justices of the Superior Courts of Judicature, not more than ten days after the commencement of the restriction or detention; and subsequently, the case may be reviewed at intervals of not more than three months.

The person restricted or detained may either appear in person or by a lawyer of his choice, who may make representations on his behalf before the tribunal. The tribunal, upon a review of a case involving a person who has been restricted or detained during an emergency, may order his release and the payment of adequate compensation, or uphold the grounds of his restriction or detention, which must be complied with. The Constitution also provides that in every month that Parliament sits, a designated Minister of State authorized by the President must present a report to Parliament detailing the number of persons restricted or detained, and the number of cases in which the authority that ordered the restriction or detention has acted in accordance with the tribunal’s decisions. In addition to these constitutional

requirements, the authorized Minister of State is also required to publish in the Gazette and in the national media the number and the names and addresses of the persons restricted or detained; the number of cases that have been reviewed by the tribunal; and the number of cases in which the authority that ordered the restriction or detention has acted in accordance with the tribunal's decisions. The Constitution then finally provides that at the end of the emergency, all persons restricted or detained must be released forthwith.

There has not been a declaration of a state of emergency in Ghana or any part thereof in the wake of the COVID-19 Global pandemic. Hence, there has been debate in legal academia and also amongst social commentators whether there can be an emergency without a declaration of a state of emergency as mandated under the Constitution. The path adopted by the Government of Ghana so far involves passing a new law to impose restrictions in some parts of the country that have been deemed the hotspots of COVID-19. It seems however clear that, given the nature of the pandemic, a state of emergency could have been declared even if it was limited to the hotspots as identified by the Government pursuant to the Constitution and Act 472. It is easy to therefore speculate that a state of emergency has not been declared probably because of the procedural safeguards embedded in every step of the way, and that the Executive would want to avoid such scrutiny especially in these times where decisive action is needed. However, it is very possible also that the Executive may have valid reasons or justifications for choosing the path they did, due to the fact that the Constitution makes provision for the imposition of restrictions under certain circumstances, as will be discussed shortly.

Measures adopted in Ghana to deal with COVID-19

Ghana has not declared a state of emergency but opted to enact “emergency legislation” although the Constitution and the Emergency Powers Act, 1994 (Act 472) provide the tools to effectively deal with the coronavirus pandemic. This has led some commentators to criticize the government’s approach as being needless and creating the possibility of abuse of rights of Ghanaians. Below is a brief exposition of the measures undertaken in Ghana to deal with the pandemic, in particular a review of the new legislation that has been adopted and other emergency powers deriving from pre-existing laws.

The Imposition of Restrictions Act, 2020 (Act 1012)

On the 21st March 2020, the President of Ghana assented to the Imposition of Restrictions Bill, thereby giving legal effect to it, in response to the COVID-19 pandemic. The Imposition of [Restrictions Act](#) is expressed to be an Act “to provide for the imposition of restrictions in accordance with paragraphs (c), (d) and (e) of clause (4) of article 21 of the Constitution, and for related matters”. Article 21 of the Constitution deals with General Fundamental Freedoms which include: the right to free speech and expression; freedom of thought, conscience and belief; freedom of religion; freedom of assembly; freedom of association; freedom of information; and freedom of movement.

The objective of Act 1012 is to provide for powers to impose restrictions on Article 21(4)(c), (d) and (e) of the Constitution. The President may therefore, acting in accordance with the advice of relevant persons or bodies, impose restrictions by Executive Instrument in line with the aforementioned constitutional provisions. The duration of restrictions imposed pursuant to the Act is for a period of not more than three months. That notwithstanding, depending on the exigencies of the circumstances, the duration of the restrictions may be shortened or extended for not more than one month at a time, but cannot be extended for more than three months in total. Exemptions regarding the restrictions may be made in relation to persons and geographical areas by the President if he deems it expedient so to do. Finally, section 6 of the Act makes failure to comply with restrictions imposed under an Executive Instrument made pursuant to the Act, a criminal offence punishable by a fine or imprisonment of not less than four years or more than ten years or to both.

On 23rd March 2020, the President of Ghana exercised the power conferred upon him by Act 1012 by issuing the [Imposition of Restrictions \(Coronavirus Disease \(COVID-19\) Pandemic\) Instrument, 2020 \(E.I. 64\)](#). Restrictions were imposed on public gatherings and travel to Ghana. Education at all levels, involving personal contact, was also brought to a halt with the closure of all schools. The duration of these restrictions was for a period of three weeks and applicable to the entire country. Subsequently, the [Imposition of Restrictions Coronavirus Disease \(COVID-19\) Pandemic \(No. 2\) Instrument, 2020 \(E.I. 65\)](#) was issued on 30th March 2020 to restrict the movement outside places of abode of persons within Accra, Tema, Kasoa and Kumasi for a period of two weeks, in an attempt to halt the spread of the virus. Contact tracing and mass testing were to be conducted during this period to identify, isolate and treat persons who may have contracted the virus. E.I. 65 also continued in force E.I. 64, meaning that restrictions on public gatherings and travel to Ghana were maintained. The [Imposition of Restrictions Coronavirus Disease \(COVID-19\) Pandemic \(No. 3\) Instrument, 2020 \(E.I. 66\)](#) further extended the restrictions on travel to Ghana for two weeks with effect from midnight on 5th April 2020, and this has subsequently been continued in force to date, together with the ban on all public gatherings.

Electronic Communications Act, 2008 (Act 775)

[Act 775](#) entered into force on 6th January 2009 and is expressed to be an Act to provide for the regulation of electronic communications, broadcasting, as well as the use of the electro-magnetic spectrum and for related matters. Interestingly, section 99 of this Act deals with communications during a state of emergency. It provides:

“Where a state of emergency is declared under Article 31 of the Constitution or another law, an operator of communications or mass communications systems shall give priority to requests and orders for the transmission of voice or data that the President considers necessary in the interest of national security and defence.”

Clearly, this power can only be activated and resorted to when there has been an actual declaration of a state of emergency. By far the most controversial provision of this Act however, giving wide powers to the President, does not require there to be an emergency. Section 100 of the Act provides:

“The President may by executive instrument make written requests and issue orders to operators or providers of electronic communications networks or services requiring them to intercept communications, provide any user information or otherwise in aid of law enforcement or national security.”

It is this provision that the Government of Ghana has relied upon in the wake of the COVID-19 pandemic ostensibly for the purposes of contact tracing, beginning 23rd March 2020. The [Establishment of Emergency Communications System Instrument, 2020 \(E.I. 63\)](#) thereby derives its authority from section 100 of Act 775. Network operators and communication service providers are thus by virtue of E.I. 63 to put their services at the disposal of the State for mass dissemination of information to the public in the case of emergency including a public health emergency. They are also to make available all caller and called numbers, merchant codes, roaming files and location log files to the National Communications Authority (NCA). The problem with this approach is that – although it might be necessary to fight the spread of COVID-19 – these broad powers may very well be deployed as mass surveillance tools that could be used to violate the privacy of individuals and groups in the future.

Impact of Measures adopted in Ghana to deal with COVID-19

The measures adopted by the Government of Ghana so far have primarily been through the imposition of restrictions in line with the newly enacted Act 1012. Bearing in mind that there has not been a declaration of a state of emergency, the following brief discussion will focus on whether the restrictions and other measures adopted accord with constitutionalism generally, in light of the COVID-19 public health emergency.

Legislature and Judiciary

The operation of the Legislature and the Judiciary have not been suspended. The Judiciary, for instance, has taken steps including a scaling up of case management techniques to avoid large gatherings in courtrooms. Also, court cases in the cities that were under lockdown orders were to be adjourned until May/June 2020, whilst designated courts in the affected areas were open to deal with critical cases involving breaches arising from the restriction orders and other criminal offences; with the Supreme Court and the Court of Appeal also on standby to handle urgent cases that the Chief Justice may determine during the period of restrictions. Parliament has also been operating during this period.

Human Rights

Beyond the restrictions imposed in accordance with the Imposition of Restrictions Act, human rights in general have not been suspended. This is so because it is only a declaration of a state of emergency under the Constitution and Act 472 that can lead to the suspension of most of the rights guaranteed under the Constitution. Rights that have not been completely suspended but restricted are: the right to education; the right to cultural life; political rights; freedom of expression; freedom of association and assembly; right to leisure; and religious rights. Also, the invocation of the powers of the President deriving from Section 100 of the Electronic Communications Act presents a problem in terms of potential abuse of the right to privacy as earlier suggested. It suffices to note that as at Sunday 19th April 2020, the President of Ghana has lifted the restrictions imposed in the Ghana hotspots, whilst maintaining the ban on all public gatherings nationwide.

No sunset clause on the exercise of new powers

A troubling issue that some commentators have raised, regarding the Imposition of Restrictions Act for instance, is that it has no sunset clause, even though the restrictions themselves may be limited in duration. [Professor Appiagyei-Atua therefore notes:](#)

“It is in this vein that the government has enacted Act 1012, which could have current and future implications for the enjoyment of rights in the country as it constitutes a slippery slope likely to lead to a situation where an illegality will be justified and normalized. What is even more worrying is the fact that the Act has no sunshine clause in it but is rather a permanent Act to provide for powers to impose restrictions on persons, to give effect to paragraphs (c), (d) and (e) of clause 4 of Article 21 of the Constitution in the event or imminence of an emergency, disaster or similar circumstance to ensure public safety, public health and protection”.

